

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JON ALLEN SPOOR,

Defendant-Appellant.

UNPUBLISHED

November 25, 2003

No. 242165

Kalkaska Circuit Court

LC No. 01-002140-FH

Before: Cooper, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals by right his convictions of two counts of criminal sexual conduct in the third degree (CSC III), MCL 750.520d, and one count of criminal sexual conduct in the fourth degree (CSC IV), MCL 750.520e, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant alleges that trial counsel rendered ineffective assistance because he did not move for a directed verdict at the close of the prosecution's case. We disagree. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *Id.*; *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Complainant's testimony established the elements of the charged offenses. The testimony of a victim in a criminal sexual conduct case need not be corroborated. MCL 750.520h. The determination of the credibility of the witnesses belongs to the trier of fact, even if the testimony is inconsistent. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Had defense counsel moved for a directed verdict at the close of the prosecution's case, the trial court would have denied the motion. Counsel was not required to make a meritless motion. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Defendant has not established prejudice. *Carbin*, *supra*.

Defendant argues that the trial court abused its discretion by denying his motion for a new trial. We disagree. To justify a new trial on the ground of juror misconduct, a defendant must show actual prejudice resulting from the presence of the juror, or that the juror was excusable for cause. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). The misconduct must have been such as to have affected the impartiality of the juror or to have disqualified him from exercising the powers of reason and judgment. *People v Fetterley*, 229 Mich App 511, 545; 583 NW2d 199 (1998), quoting *People v Nick*, 360 Mich 219, 230; 1003 NW2d 435 (1960). We review a trial court's ruling on a motion for a new trial for an abuse of discretion, and a trial court's findings of fact for clear error. *Crear, supra*.

The trial court heard the juror's testimony and found the juror to be credible. The trial court rejected the testimony defendant proffered. We give great deference to a trial court's superior ability to judge the credibility of witnesses. MCR 2.613(C); *People v Johnson*, 103 Mich App 825, 830; 303 NW2d 908 (1981). Defendant has not shown either that he was prejudiced by the presence of the juror, or that the juror was excusable for cause. The juror's knowledge of complainant's identity would not have allowed defendant to challenge the juror for cause. MCR 2.511(D). Defendant has made no showing that the juror did not judge the case in an impartial manner. *Fetterley, supra*. No abuse of discretion occurred. *Crear, supra*.

Defendant argues that he is entitled to resentencing on his convictions of CSC III because his minimum terms of five years, ten months for those convictions are disproportionate to his circumstances and those of the offense. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We disagree. Defendant's minimum terms for his convictions of CSC III were within the applicable statutory sentencing guidelines. We must affirm sentences within the guidelines absent an error in the scoring of the guidelines or reliance on inaccurate information in determining sentence. MCL 769.34(10); *People v Garza*, ___ Mich ___; ___ NW2d ___ (#123658, dec'd 11/4/03). Defendant has not alleged that the guidelines were erroneously scored or that the trial court relied on inaccurate information in determining his sentences. He is not entitled to resentencing.

We affirm.

/s/ Jessica R. Cooper

/s/ Jane E. Markey

/s/ Patrick M. Meter